a radical step toward the American doctrine. He says, "It is contended for the defendant that though the agreement may be binding as between the defendant and his co-directors, the company are not thereby relieved from liability to pay the defendant his fees. In support of that contention the case of *Tweddle v. Atkinson* was cited, reliance being placed especially on the judgment of Wightman, J.; but it is clear that the plaintiff in that case was in no sense a party to the agreement, and the decision cannot, therefore, be regarded as governing the present case."

C. B.

PRICE RESTRICTIONS ON RESALE OF CHATTELS.

In a recent Federal case,[1] the court held that an agreement for price restriction in case of a patented article was binding upon the vendee. Stress was laid upon the fact that the object to which the agreement related was a patented article, thus raising an inquiry in the mind of the reader as to what result would follow if an ordinary chattel were involved.

That a general restraint on the alienation of chattels is void is a well-established common-law doctrine.[2] But this does not mean that all conditions on vendee's privilege of resale are invalid. For limited restrictions as an incident to the sale of chattels are permissible at common law.[3] The usual test of validity is that such restriction must not be wider than the protection of the parties thereto demands nor so wide as to affect the public injuriously—in other words, it must not be in unreasonable restraint of trade.[4] And so even in cases of ordinary chattels, the circumstances may be such as to make stipulations as to price of resale binding upon the vendee.[5]

According to the decision of the principal case, the patent has added to the power of its owner enabling him to exact an agreement from the vendee as to the price of resale even though the effect is to prevent competition and thus maintain prices. So that patented articles are exempted from the operation of the usual common law inhibition of restraint of trade or monopoly.

[1] *American Graphaphone Co. v. Boston Store of Chicago*, 225 Fed. 785.
[2] *Coke on Littleton*, Sect. 360.
[3] *Grogan v. Chaffee*, 156 Cal. 611; *Walsh v. Dwight*, 40 N. Y. A. D. 513; *Garst v. Harris*, 177 Mass. 72.
[4] *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24.
[5] See note 3, supra.

That a patentee is so favored may be attributed to the patent law. The protection given to inventors and authors in this country originated in the Constitution.[6] Pursuant to this provision the Act of Congress provides that every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the *exclusive* right to *make, use* and *vend* the invention or discovery.[7]

It is by virtue only of this act that the patentee can claim rights, powers, privileges or immunities that are not incident to the ownership of ordinary chattels. That the statute gives him the power to prevent others from making, using or vending his invention is clear. This naturally enables the patentee to control the whole output of the particular article and thus gives him a monopoly. So that a monopoly which is obnoxious to the common law is thus legalized. However, the added privilege of making agreements restricting price of resale does not necessarily flow from the express powers given by the act of Congress.

Once the patented object has been sold, courts might have held that the exclusive right to vend had been exercised and the patentee subject to the same law as the owner of an ordinary chattel. As the general welfare of the people was to be furthered by the encouragement of inventions the patent act was liberally construed. The courts reason that inasmuch as the patentee could create agencies to sell for him directly to the consumer at certain prices, he should be permitted to reach the same result by a different method, namely, by getting a binding obligation from the vendee not to sell below a certain price. Or it is agreed that excluding all others from selling includes the lesser privilege of imposing such conditions as to the price of resale as the patentee sees fit and the objection of restraint of trade is unavailing.

If then we conclude that the patent law has clothed the patentee with a power to control the price of his article by the method of restrictive agreement, can he also attain this by means of a license-restriction-notice so as to bind not only his immediate vendee but all those that have knowledge of the price stipulation? This depends upon whether we are ready to apply to patented

[6] Section 8 of article 1 of the Constitution authorizes Congress "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

[7] Section 4884 of the Revised Statutes.

articles the doctrine of *Tulk v. Moxhay*[8] relating to land, that the condition or restriction attaches to the chattel and all who take with notice are bound thereby.

In the case of ordinary chattels, the condition of resale, even if valid, only creates a personal obligation against the party contracting and purchasers with notice are not bound.[9] And according to the case of *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*[10] the owner of a trade-secret article has no greater power in imposing a restriction upon resale than the owner of any chattel property. As regards copyright works, the Supreme Court of the United States[11] decided that the main purpose of the copyright law was to give the exclusive right to multiply copies of works and for that reason held that a notice as to the price of resale was ineffectual as against one not bound by contract.

In the case of patented articles the English courts hold that one who has taken with notice of a price-restriction of resale is bound.[12] This view obtained in our Federal courts[13] until reversed by *Bauer v. O'Donnell,*[14] which held that a patentee cannot by notice limit the price of his article. As our patent law is worded almost identically as the English one, our arriving at a different conclusion must be due to a difference in the construction of the language. However, the Supreme Court has not been consistent in its interpretation of the patent law. For curiously enough, but a few years before the Bauer case, it decided in *Henry v. Dick Co.*[15] that a license restriction authorizing the use of a patented article only in connection with certain unpatented articles made by the vendor bound all with notice and the defendant who sold one of these unpatented articles mentioned in the license restriction after notice was liable as a contributory infringer.

An attempt was made in the Bauer case to distinguish between these cases because one involves a restriction on *use* and the other

[8] 78 R. R. 289.

[9] *Taddy v. Sterious,* [1904] 1 Ch. 354; *Garst v. Hall & Lyon,* 179 Mass. 588.

[10] 220 U. S. 373.

[11] *Bobbs-Merrill Co. v. Straus,* 210 U. S. 339.

[12] *Phonograph Co. v. Menk,* 1911 A. C. 336.

[13] *New Jersey Patent Co. v. Schafer,* 144 Fed. 437; *Victor Talking Machine Co. v. The Fair,* 123 Fed. 424.

[14] 229 U. S. 1 (4 judges dissenting).

[15] 224 U. S. 1.

on *selling*. But inasmuch as all the added powers and privileges the patentee obtains are derived from the act that gives him "the exclusive right to *make, use,* and *vend,*" a power to impose similar conditions and limitations must of necessity exist where the exclusive right to vend is exercised as where the patentee exercises the exclusive right to *use*. Perhaps the court has receded from its former position in the Dick case and now refuses to supplement to the personal obligation that may be imposed upon a vendee by contract an equitable constructive obligation on all those that take with notice of the restrictions or conditions. As has been intimated before, the patent act does not expressly endow a patentee with the extraordinary power of being able to impose a servitude on his goods analogous to burdens on land. Nor does this power seem to be reasonably incidental to the express powers and the court is justified in refusing to give patented articles the status of land and thus bind strangers by mere notice.

The principal case dealing as it does merely with the personal right against the party who contracted appears to be sound. For endowing patented articles with immunity from the objection of monopoly is in line with the general policy of the law in encouraging inventions. And as the law has granted the patentee a monopolistic right of vending, it may be considered as fairly incidental to hold that an agreement restricting the price of resale is valid.

M. H. L.

ORAL ASSENT BY THE BANK OF PRESENTMENT TO THE DIRECTION OF ITS DEPOSITOR TO PAY HIS NOTE HELD BY IT FOR COLLECTION AS DISCHARGING THE INSTRUMENT.

The decision of the New York Court of Appeals in the recent case of *Baldwin's Bank of Penn Yan v. Smith* is novel, striking and of great importance in the practical workings of the business community. The holder of a note payable at the W. bank sent it before maturity to that bank "for collection and remittance." On the due day the maker telephoned to the bank and, on being informed by the president that the note was there, directed that it be paid, and was told that that would be done. Seven days later the bank failed without having remitted to the holder, or made a transfer of credits, or marked the note or done anything further to evidence payment. At all times the maker had sufficient funds